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Supreme Court of the United States

OCTOBER TERM, 1997

In Re: Joseph Smith & Sons, Incorporated,
Debtor.

CONTAMINATED SOIL CONSULTANTS, INCORPORATED,

Petitioner,

v.

JOSEPH SMITH & SONS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) A proof of claim executed and filed in accordance with the requirements of the Fed.R.Bankr.Proc. is entitled to prima facie effect pursuant to Fed.R.Bankr.Proc. 3001(f). Is a bare legal objection to such a claim, nothing else appearing, sufficient to shift the burden of going forward to the claimant?

(2) Must proof of the tort of abuse of process under Maryland law include a showing of an independent "wilful act" following the initiation of an action where there is proof of an unjustified ulterior purpose in the initiation and prosecution of that action?

PARTIES TO THE PROCEEDING

The names of all parties are listed in the caption and style of the case. Pursuant to Rule 29.6, the petitioner states that it is not owned, in whole or in part, by a parent entity and that it has no subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED .. 2

STATEMENT OF THE CASE 3

ARGUMENT AND REASONS TO GRANT THE WRIT 8

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: **PAGE**

American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U.S. 350, 65 L.Ed. 983, S.Ct. 499 (1921) 24

Bartlett v. Christhilf, 14 A. 518 (Md. 1888) 16

Berman v. Karvounis, 308 Md. 259, 518 A.2d 726 (1987) 16, 17, 19

Dishaw v. Wadleigh, 15 A.D. 205, 44 N.Y.S. 207 (1897) 24, 25

In re: Friedman, 436 F.Supp. 234 (D. Md. 1977) 12

In re: G. Marine Diesel Corp., 144 B.R. 851 (Bankr. E.D.N.Y. 1993) ... 14

In re: Lentz, 110 B.R. 523 (D. Colo. 1990) 12

Krashes v. White, 275 Md. 549, 341 A.2d 798 (1975) 19

Mills County State Bank v. Roure, 291 N.W.2d 1 (Iowa, 1980) 24

Palmer Ford, Inc. v. Wood, 298 Md. 484,
471 A.2d 297, (1984) 22

One Thousand Fleet Ltd. Partnership
v. Guerriero, 346 Md. 29,
694 A.2d 952, 1007 WL 324389
(Md. June 12, 1997) 16, 18

Rexnord Holdings, Inc. v. Bidermann,
21 F.3d 522 (2d Cir. 1994) 14, 15

Vodrey v. Golden, 864 F.2d 28
(4th Cir. 1988) 25, 26, 27

Whitney v. Dresser, 200 U.S. 532,
50 L.Ed. 584, 26 S.Ct. 316 (1906) 13

STATUTES AND RULES:

11 U.S.C. § 501 4

11 U.S.C. § 502(a) 2, 12

18 U.S.C. § 1961 et. seq. 3

28 U.S.C. § 157(b)(5) 8

28 U.S.C. § 158 6

28 U.S.C. § 1254(1) 2

Fed.R.Bankr.Proc. 3001 4

Fed.R.Bankr. Proc 3001(a) 13

Fed.R.Bankr.Proc. 3001(b) 13

Fed.R.Bankr.Proc. 3001(f) 13

Fed.R.Bankr. Proc. 8001 7

SECONDARY AUTHORITIES:

R.P. Gilbert, P.T. Gilbert, and R.J. Gilbert, Maryland Tort Law Handbook, § 5.4 (1986) 19, 20

Harper, James and Grey, The Law of Torts (3rd. ed. Supp. 1996), §4:92-96 ..... 22, 23

W. Prosser, Handbook of the Law of Torts, § 121 (4th ed. 1971) 19

Restatement (Second) of Torts, § 682 (1977) 21

No.____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CONTAMINATED SOIL CONSULTANTS, INC.,

Petitioner,

v.

JOSEPH SMITH & SONS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1) is unreported, as are the opinions of the district court

(App., infra, 10) and the bankruptcy court (App., infra, 30).

JURISDICTION

The order of the court of appeals, which affirmed the district court, was entered on August 5, 1997. The court of appeals denied petitioner's petition for rehearing on September 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 502(a) provides, in pertinent part, that

> [a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest. . . objects.

Fed.R.Bankr.Proc. 3001(f) states that

> [a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

STATEMENT OF THE CASE

On June 2, 1992, Joseph Smith & Sons, Inc. ("JSS"), and R. Paul Smith ("Smith") sued Fred Zehner ("Zehner"), his company, Contaminated Soil Consultants, Inc. ("CSCI"), the Petitioner herein, and others pursuant to, inter alia, the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 et seq. (the "RICO Litigation") in the Circuit Court of Prince George's County, Maryland. The complaint also alleged: defamation, intentional interference with the business of Smith and JSS, intentional infliction of emotional distress, and various conspiracies among the defendants to commit these wrongful acts. The nine counts of the complaint sought, in toto, damages of Nine Hundred-Fifty Million Dollars ($950,000,000.00) jointly and severally from the defendants. During the course of discovery in the RICO Litigation, it became increasingly apparent that the suit

was groundless, and that it had been filed and prosecuted by Smith and JSS for the sole purpose of eliminating competition in the recycling business in Maryland.

On June 6, 1994, Smith and JSS each filed petitions for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Maryland. On September 2, 1994, Smith and JSS removed the RICO Litigation to the bankruptcy court. On December 22, 1994, Smith and JSS filed a Joint Motion to Dismiss the RICO Litigation, which the bankruptcy court allowed on May 25, 1995.

Zehner and CSCI filed Proofs of Claim in the Smith and JSS cases pursuant to 11 U.S.C. § 501 and Fed.R.Bankr.Proc. 3001 on September 8, 1994 (the "Claims"). The Claims alleged that Zehner and CSCI suffered damages due to Smith and JSS filing and continuing the prosecution of the baseless RICO Litigation

which constituted the tort of abuse of process under Maryland law. Smith and JSS filed a Joint Objection to the Claims and a Joint Motion to Estimate the Claims on July 10, 1995, asserting that because the Claims were meritless, the Claims should be denied and estimated to have a value of "zero".

The bankruptcy court held a Hearing on the Joint Motions to Object to, and to Estimate, the Claims on October 17, 1995. At that Hearing, the bankruptcy judge heard the objections to the Claims, and reasoned that the Estimation Motion would be moot if the Court ruled to sustain the Objections. The bankruptcy court then ruled that the burden of going forward as to the existence of the Claims had shifted to Zehner and CSCI because of the Objections (App, infra, at 39). Zehner and CSCI were thereby forced to proceed with proof of the existence of the Claims with the testimony of Zehner and another

defendant in the RICO litigation (the parties having agreed that damage evidence would be presented only after liability was established).

At the conclusion of this testimony, without any evidence from Smith and JSS, the bankruptcy court announced its ruling from the bench, summarily finding that Zehner and CSCI had failed to make a sufficient showing under Maryland law to establish the elements of the tort of abuse of process, and sustained the Objections of JSS and Smith, disallowing the Claims (App, infra, at 32-37). On October 18, 1995, the bankruptcy court entered an Order denying the Joint Motion to Estimate the Claims as moot (App, infra, at 29); on October 24, an Order was entered by the court sustaining the Joint Objections, and disallowing the Claims (App, infra, at 25).

On October 27, 1995, Zehner and CSCI filed a timely Notice of Appeal, pursuant to 28 U.S.C. § 158 and

Fed.R.Bankr.Proc. 8001, from the bankruptcy court's Order disallowing the Claims. On October 15, 1996, based upon a review of the briefs, the record, and the "applicable case law", but without the benefit of oral argument, the district court entered an Order and Memorandum Opinion affirming the decision of the bankruptcy court, (App, infra, at 10).

Zehner and CSCI appealed the decision of the district court, noticing the appeal on November 13, 1996. The appeal was docketed in the court of appeals on December 3, 1996, argued in Charleston, South Carolina, and on August 5, 1997, the court of appeals affirmed the district court in a per curium, unpublished decision (App, infra, at 1).

ARGUMENT AND REASONS TO GRANT THE WRIT

A. This case involves basic issues in the bankruptcy claims allowance process of substantial public interest.

Ordinarily, the bankruptcy claims allowance process addresses debts arising out of contractual relationships; proof of such debts do not generally present undue difficulties to the court or the parties. Personal injury and wrongful death tort claims, however, have been recognized by Congress to be sufficiently different to be removed entirely from the claims allowance process and be tried in the district court. 28 U.S.C. § 157(b)(5).

In this case, however, we have a claim based upon a business tort, not a personal injury or contract claim. As the bankruptcy court demonstrated, tort-based claims present the proverbial "square peg in a round hole" problem, creating uncertainty as to how the usual rules and procedures of the claims allowance process are to be applied. What is required to demonstrate a prima facie

claim based upon a business tort, and what is the evidentiary effect of such a showing? These are subtle questions, and resolution of these questions would provide important guidance to claimants and their counsel, as well as providing relief to the Petitioner in this case.

B. The Factual Predicate in this case.

The allegations in the RICO complaint, reverberating for years among the environmental remediation customers of CSCI in Maryland, had its intended effect: CSCI was branded as a RICO criminal and CSCI was effectively put out of business. Contrary to the bankruptcy judge's conclusion, CSCI was a business competitors of Smith and JSS. The sole reason for the institution and continuance of the RICO Litigation against CSCI, long after discovery demonstrated that the allegations of the complaint were baseless, was business malice by Smith towards CSCI and the desire to eliminate

CSCI as a business competitor.

Initiating and pursuing a baseless lawsuit for the express purpose of injuring a business competitor, and thereby injuring the competitor, contrary to the rulings below, constitutes the tort of abuse of process under long-standing Maryland law. Such an injury is a proper subject for a proof of claim in the tort-feasors' bankruptcy cases. So when Smith and JSS took refuge in Chapter 11, CSCI sought recompense for its damages by filing a proof of claim ("POC") in the cases.

Each POC was filed on "Form B 10", the Official Bankruptcy Form 10 and, following the instructions of Line 7 of Official Form 10, included a second page entitled "SUPPORTING DOCUMENTS". Both the RICO Complaint and the Amended RICO Complaint were attached to each POC. In addition, certain other documents "to [sic] voluminous to attach" were listed by

name and briefly summarized. In summary fashion, two paragraphs stated the basis for the claim of abuse of process on the second page attachment to the POC:

> The wrongful act that the Debtor committed was a malicious filing of the subject lawsuit against the creditor with a total disregard for the damage it would inflict upon the creditor and without any merit as to the substance of the claims contained in the Complaint filed by the Debtor.
>
> The abuse of judicial process and malicious filing of this lawsuit caused severe financial damages to the creditor in the form of loss of business and loss of financial investment. (Record, Appendix, at 41, 44).

At the hearing upon Smith's and JSS's Motions Objecting to, and seeking Estimation of, the Claims of Zehner and CSCI, the bankruptcy judge held without further explanation that:

> Once there's been an objection filed based upon lack of substantiation of a claim, then I think that the burden of going forward rests upon the claimant. (App., infra, at 39).

The bankruptcy judge then directed CSCI to proceed with its evidence. This ruling, however, was in error and deprived CSCI of the advantage of the prima facie case which the POC had established.

C. The POC is, by itself, probative evidence and adequate as such to shift the buren of going forward to the debtor.

11 U.S.C. § 502(a) provides, in pertinent part, that:

> A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest. . . objects.

Under Fed.R.Bankr.Proc. 3001(f), a properly executed proof of claim establishes a prima facie case against the debtor's assets. In re: Lentz, 110 B.R. 523, 525 (D. Colo. 1990). The effect of this prima facie case is

> to shift the burden of producing evidence and to entitle the claimant to a share in the distribution of the bankrupt's estate unless an objector comes forward with evidence contradicting the claim. (emphasis added). In re: Friedman, 436 F.Supp. 234, 237 (D.

Md. 1977)(citation omitted).

The POC "conform[ed] substantially to the appropriate Official Form" and contained a "written statement" setting forth his claim, Fed.R.Bankr.Proc. 3001(a), and was appropriately executed. Fed.R.Bankr.Proc. 3001(b). As such, the POC was entitled to prima facie effect.

A proof of claim, properly executed, is probative evidence in and of itself without any requirement that it be formally admitted into evidence. Whitney v. Dresser, 200 U.S. 532, 50 L.Ed. 584, 26 S.Ct. 316 (1906). In Whitney, Justice Holmes framed the issue (in the alternative) as "whether the sworn proof is evidence at all." Id. at 200 U.S. 535. The Court held that the proof of claim, standing alone, is to be afforded probative force even if denied by the debtor. Justice Holmes reasoned that "the alternative would be that the mere interposition of an objection...

would require the claimant to produce evidence". He concluded that the summary nature of bankruptcy proceedings required that some evidentiary weight be afforded a proof of claim so as to avoid the expense and delay incident to a requirement that creditors formally put on evidence in every case. Id.

In this case, the "mere interposition of an objection" by Smith and JSS destroyed the prima facie effect to which the POC was entitled and reversed the burden of going forward. Even if the evidentiary weight afforded a proof of claim were only slight, any factual objection to the proof of claim must be at least "sufficient... to rebut the claimant's prima facie case." In re: G. Marine Diesel Corp., 144 Bankr. 851, 853 (Bankr. E.D.N.Y. 1993). In this case, Smith's and JSS's Objections raised no factual issues. Legal memoranda and oral argument do not suffice as evidence sufficient to create a factual dispute. Rexnord

Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). This legal error by the bankruptcy court, affirmed by the district court and ignored entirely by the court of appeals, prejudiced CSCI in its pursuit of the Claims, and violated the explicit provisions of the Bankruptcy Code.

D. The POC stated the elements required for a prima facie case of abuse of process under Maryland law at the time of the Hearing, and the evidence adduced demonstrated sufficient facts to support the claim.

A dispute over the requirements under Maryland law to plead and prove the tort of abuse of process has been at the heart of this case from its inception. The bankruptcy judge ruled from the bench that the tort required that:

> [t]here must be a subsequent use of the use of the process after the institution of the action and that particular use must be improper (App., infra, at 33),

and decided against Zehner and CSCI because he found that no improper "subsequent use" had occurred.

The district court elaborated upon the bankruptcy judge's bench ruling, citing the Maryland Court of Appeals case of Berman v. Karvounis, 308 Md. 259, 262, 518 A.2d 726, 727 (1987), as authority for the elements of abuse of process in Maryland: (1) an ulterior motive, (2) "a wilful act in the use of the process not proper in the regular conduct of the proceeding" and (3) damages resulting from the perverted use of the process. (App., infra, at 16).

The appeals court confirmed the growingly confused state of Maryland law when it relied upon a case decided while this case was on appeal (and only available then on Westlaw), One Thousand Fleet Ltd. Partnership v. Guerriero, 1007 WL 324389 (Md. June 12, 1997)(citing Bartlett v. Christhilf, 14 A. 518 (Md. 1888)), to hold that Maryland law requires that the damages from abuse of process must be in the form of arrest of the person or seizure of the plaintiff's property. (App., infra, at 7). The

appeals court then ruled against Zehner and CSCI because they had not alleged damages in the form of the arrest of the person or the seizure of property. (App., infra, at 9).

CSCI disagreed with the bankruptcy and district courts as to the requirements of Maryland law, arguing that, under the circumstances of the case, a subsequent "wilful act" is not a required element of the tort of abuse of process. However, CSCI is completely bewildered by the court of appeals decision, and the Maryland authority upon which it relied, because no one-- party or judge-- during course of this litigation understood Maryland law to require arrest of the person or seizure of property as an element of the tort. See Berman v. Karvounis, supra (none of the authorities cited by the court even suggest a requirement of bodily arrest or seizure of property). The court of appeals said that it "need not consider" whether Zehner's and CSCI's claims meet the requirements of the

first and second elements of the tort of abuse of process--issues argued during the appeal-- because they "obviously fail to meet the third element", the bodily arrest/seizure of property element. (App., infra, at 8-9). Of course, it is this third element that the parties never reached due to the bifurcated hearing, and upon which CSCI was never allowed to put on evidence. Even assuming, arguendo, that an allegation of bodily arrest or seizure of property was a required element of the tort of abuse of process, the appropriate procedure for the bankruptcy court to follow upon making that determination (which it never did) would have been to allow the opportunity for an amendment to the POC, not to dismiss it.

CSCI contends that One Thousand Fleet Ltd. Partnership v. Guerriero, supra, reversed a century of Maryland law on abuse of process sub silentio, and does not constitute a statement of the law of Maryland at the

time of the bankruptcy hearing. For this reason, it was error for the appeals court to rely upon the case.

Instead, the appropriate authority for this Court to consider is the authority relied upon by the parties and the district and bankruptcy courts below. The tort of abuse of process under Maryland law was stated in Berman v. Karvounis, supra to occur "when a party has wilfully misused civil or criminal process after it has issued in order to obtain a result not contemplated by law", quoting Krashes v. White, 275 Md. 549, 555, 341 A.2d 798, 902 (1975). Id. at 262. The Maryland court went on to quote from W. Prosser, Handbook of the Law of Torts, § 121 at 857 (4th ed. 1971):

> The essential elements of the tort of abuse of process as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of process not proper in the regular conduct of the proceeding.

The Court also cited R.P. Gilbert, P.T. Gilbert, and R.J.

Gilbert, Maryland Tort Law Handbook, § 5.4 at 47 (1986) for the elements of the tort:

> 1. the defendant wilfully used process for an illegal purpose;
>
> 2. to satisfy the defendant's ulterior motive; and
>
> 3. the plaintiff was damaged by the defendant's perverted use of the process. (footnote omitted).

It is important to note that two of the three definitions cited by the Maryland Court fail to recognize, or even allude to, any requirement of Prosser's separate "wilful act". **Not one** of these three authorities requires a body arrest or seizure of property.

There is no question that many courts have been profoundly influenced by Prosser's work. The problem with reliance on Prosser in this instance is that Prosser's analysis of the point was incomplete.

A more complete statement of the elements of the

tort is found in the Restatement (Second) of Torts, § 682 (1977), which explains that:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Comment a. to § 682 does not require a second "wilful act" as an element of the tort. It merely states that "[t]he subsequent misuse of the process, though properly obtained, constitutes the misconduct for which liability is imposed...". While this sentence certainly would encompass Prosser's second "wilful act", a close reading of Comment a., in light of the text of the Rule, clarifies that the "subsequent misuse" of the process is the carrying out of the process for a wrongful purpose. Further, Comment b., by implication, allows for unusual cases of abuse of process, where no additional "wilful act" is required: "[t]he usual case of abuse of process is one of some form of

extortion, using the process to put pressure upon the other..." to obtain a result not properly obtained from the process itself.(emphasis added). See, e.g., Palmer Ford, Inc. v. Wood, 298 Md. 484, 511-14, 471 A.2d 297, 310-12 (1984) (criminal process utilized to collect civil debt, but scant evidence of any second "wilful act" after the prosecution was initiated). The Prosser requirement that a specific "wilful act" must be shown may be designed, as observed by Harper, James and Grey, The Law of Torts (3rd. ed. Supp. 1996) at 4:92-96, to protect the traditional notion that "enforcement by legal means of a valid right... will not ordinarily constitute a tort, however improper or malicious the motive." Id. at 4:92. The requirement of the subsequent improper act helps clarify that simple spite does not meet the tort's requirement of an ulterior purpose or motive. However, Harper, James and Grey point out that because the ulterior motive is difficult to

prove,

> in the absence of such additional improper acts, ... such acts should not be regarded as indispensable if the ulterior motive, and its incompatibility with the legal system, can somehow be established otherwise. Id. at 4:97.

This analysis focuses attention where it properly belongs, on the tort-feasor's ulterior motive: the use of legal process primarily to accomplish a purpose for which the process was not intended. When process is used by a litigant for a purpose to which it was not intended, courts should not be required to stand aside unless and until the improper purpose is finally manifested by a discrete second act of the tort-feasor.

There are situations in which the tort may be committed by the legal, but unjustifiable, application of economic and legal power to achieve collateral purposes. This was the basis for the common law courts' development of abuse of process in the first instance. See,

e.g., American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U.S. 350, 359, 65 L.Ed. 983, 990, 41 S.Ct. 499, 500 (1921)("...it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the plaintiffs' business as now conducted is justified by the ulterior purpose in view."). Courts have found abuses of process without the necessity of Prosser's second act when they were satisfied that a sufficiently unjustified collateral purpose was present. See Mills County State Bank v. Roure, 291 N.W.2d 1, 5 (Iowa, 1980)("We can see no reason why there must be subsequent activity to support the cause of action. To rule otherwise would protect the tort-feasor when the abuse is most effective-where the issuance of the process alone is sufficient to accomplish the collateral purpose."); Dishaw v. Wadleigh,

15 A.D. 205, 208-09, 44 N.Y.S. 207, 208-09 (1897)("[s]till, proceedings that are authorized by law may be made use of for an improper purpose, and acts which separately are legal may be so combined together for an illegal purpose as to constitute a single act which is obnoxious to the law.").

A Justice of this Court, sitting by designation as a Circuit Judge, aptly demonstrated that the finding of a second wilful act, if such is indeed required, is de minimus if the showing of the ulterior motive is strong. In Vodrey v. Golden, 864 F.2d 28 (4th Cir. 1988)(North Carolina law), Golden filed a criminal trespass warrant against Vodrey. After the charges were voluntarily dismissed, Vodrey filed a malicious prosecution action against Golden. Golden then re-instituted the criminal charge, of which Vodrey was found not guilty. Thereafter, Vodrey amended his complaint to allege abuse of process with

respect to the second criminal charge. The district court specifically instructed the jury that a second act was required to establish the tort of abuse of process, and that the act had to be committed after the issuance of the second criminal charge. Id. at 29. The jury found Golden liable for abuse of process. On appeal, the Fourth Circuit sustained the verdict. Justice Powell found that the jury had sufficient evidence to support its finding of the second act in the active participation of Golden in the prosecution, where he conferred with the District Attorney and testified at trial. Id. at 30.

There is no principled distinction between the ordinary acts taken by a litigant to carry out a civil action and the ordinary acts taken by a prosecuting witness to prosecute a criminal case. Where it may be shown that either process was tainted by an improper ulterior motive, the required showing of the second act need be only

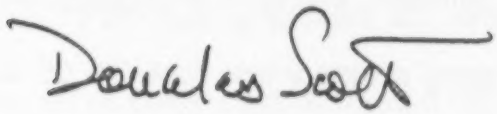
minimal. Here, as in Vodrey, the "second acts" were the same ordinary acts taken in pursuit of tainted process.

Due to erroneous failure of the bankruptcy court to give the POC prima facie effect, thus improperly shifting of the burden of going forward, and the manifestly incorrect construction of Maryland law on abuse of process, CSCI has been deprived of the opportunity to prove that the RICO Litigation, as conducted, was brought for an unjustified collateral purpose and thus constituted the tort of abuse of process. This Court should reverse and remand the case to the bankruptcy court to allow the Petitioner a meaningful opportunity to prove its case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

Opinion of the Fourth Circuit Court of Appeals 1

Memorandum Opinion of the District Court 10

Order of the District Court 24

Bankruptcy Court's Order Sustaining Objections to Claims 25

Bankruptcy Court's Order Dismissing Motions to Estimate Claims 29

Transcript of Bankruptcy Court's Bench Ruling of October 18, 1995 30

Partial Transcript of Bankruptcy Court's Bench Ruling on the Burden of Proof and of Going Forward of October 17, 1995 37

Fourth Circuit Court of Appeals' Order upon Motion for Reconsideration 40

OPINION OF THE FOURTH CIRCUIT APPEALS

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: Joseph Smith & Sons, Incorporated; In Re: Richard Wybrough,
Debtors.

FRED G. ZEHNER; CONTAMINATED SOIL CONSULTANTS, INC.,
Claimants-Appellants,
No. 96-2744

and

BENEDICT A. WIDMER,
Claimant,

CLAUDE B. SHAFFER,
Party in Interest,

v.

JOSEPH SMITH & SONS, INCORPORATED,
Debtor-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.

William M. Nickerson, District Judge.
(CA-96-137-WMN, BK-94-12947)

Argued: July 7, 1997

Decided: August 5, 1997

Before WILKINSON, Chief Judge, and WILKINS and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Bruce Montgomery Marshall, DURRETTE, IRVIN & BRADSHAW, P.C., Richmond, Virginia, for Appellants. Richard R. Page Wyrough, CAIN & WYROUGH, Upper Marlboro, Maryland, for Appellee. ON BRIEF: Douglas Scott, DURRETTE, IRVIN & BRADSHAW, P.C., Richmond, Virginia; Martin B. Ellis, SCHULMAN, TREEM & KAMINKOW & GILDEN, P.A., Baltimore, Maryland, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Contaminated Soil Consultants, Inc. (CSC) and its president and primary shareholder, Fred G. Zehner (Zehner) (collectively the Creditors), appeal the district court's affirmance of the bankruptcy court's order disallowing their claims against the bankruptcy estate of Joseph Smith & Sons, Inc. (JSS) for damages flowing from JSS's alleged abuse of civil process. The bankruptcy court disallowed the Creditors' claims on the basis that they could not establish all the elements of the tort of abuse of civil process under Maryland law. The district court agreed. We affirm.

I.

The facts material to resolution of this appeal are not in dispute. At all times relevant to this case, CSC and JSS were both participants in the waste management

industry in the State of Maryland. Specifically, both companies sold a product known as "fluff," a byproduct of the process of recycling scrap metal. Fluff is used to cover up refuse in landfills. After JSS was generally accused of selling contaminated fluff and falsifying lab reports, it filed suit against the Creditors in Maryland state court, alleging various causes of action, including, among others, fraud, conspiracy to commit fraud, defamation and intentional interference with business relations (the Tort Action). The complaint alleged in part that the Creditors conspired with a former disgruntled employee of JSS to harm JSS by delivering a letter to every member of the Prince George's County Council that contained false statements about JSS and by delivering to the same persons copies of false laboratory analyses that were alleged to be from fluff manufactured by JSS.

While the Tort Action was pending, JSS filed for

bankruptcy in the United State Bankruptcy Court for the District of Maryland. Thereafter, JSS removed the Tort Action to the bankruptcy court. Following extensive discovery between JSS and the Creditors, JSS made a motion to voluntarily dismiss the Tort Action. The bankruptcy court granted the motion.

Each creditor subsequently filed a proof of claim in the JSS bankruptcy case for $2.5 million. The proofs of claims listed the tort of abuse of civil process as their basis. According to the proofs of claims, JSS's filing and subsequent maintenance of the Tort Action "caused [them] severe financial damages . . . in the form of loss of business and loss of financial investment." (J.A. 41, 44).

JSS objected to the Creditors' claims on the basis that they did not allege facts necessary to establish the tort of abuse of civil process under Maryland law. After conducting a hearing on the matter, the bankruptcy court

sustained JSS's objections and disallowed the Creditors' claims. The Creditors appealed to the district court, alleging various points of error, including that the bankruptcy court had improperly allocated the burden of proof between the parties. The district court affirmed the bankruptcy court, and the Creditors noted a timely appeal.

II.

As do district courts, we review the factual findings of a bankruptcy court for clear error and its conclusions of law *de novo*. *See In re Johnson*, 960 F.2d 396, 399 (4th Cir. 1992). Here, our review reveals that the bankruptcy court did not err in sustaining JSS's objections and disallowing the Creditors' claims.

The parties agree that the Creditors' claims must be tested under Maryland law. As most recently articulated by the Court of Appeals of Maryland, the elements of the tort of abuse of civil process in Maryland are: (1) a willful

use of civil process on the part of the defendant after the process has issued in a manner not contemplated by law; (2) an ulterior motive; and (3) damages resulting from the defendant's abuse of process in the form of arrest of the person or seizure of property of the plaintiff. *See One Thousand Fleet Ltd. Partnership v. Guerriero*, 1997 WL 324389, at *4, *9 (Md. June 12, 1997). In elaborating on the last element, the court in *One Thousand Fleet, Ltd.* quoted the following passage from *Bartlett v. Christhilf*, 14 A. 518 (Md. 1888), with approval:

> All the cases upon this subject depend either upon the arrest of the person or seizure of his property; and we have been referred to none where this action was sustained for an injury to the plaintiff's business or good name. Any unfounded suit may result in such injury; but it will hardly be seriously contended that where there has been no wrongful deprivation of liberty or no illegal seizure of property, that each unfounded suit is to be treated as such an abuse of process of the law as will sustain action against the one who instituted it.

One Thousand Fleet Ltd., 1997 WL324389, at *9 (quoting *Barlett*, 14 A. at 522).

In accord with this statement of Maryland law, the court in *One Thousand Fleet, Ltd.* affirmed a trial court's dismissal of an abuse of process claim, because the plaintiff, a Maryland limited partnership engaged in real estate development in Baltimore City, Maryland, only alleged that it "lost money, suffered a delay of [one of] its project[s], and faced increased construction, legal and financing costs" as a result of the defendant's alleged abuse of process. *Id.* at *9-10. The plaintiff did not allege arrest of the person or seizure of its property. *Id.* at *10

Here, we need not consider whether the Creditors' claims meet the first and second elements of an abuse of civil process claim under Maryland law, because they obviously fail to meet the third element. Rather than alleging damages in the form of arrest of the person or

seizure of property, the Creditors have only alleged damages in the form of loss of business and loss of investment. Under Maryland law as most recently articulated in *One Thousand Fleet, Ltd.*, such allegations, even if proven to be true, cannot meet the third element. Accordingly, we affirm the district court's decision affirming the bankruptcy court's order sustaining JSS's objections and disallowing the Creditors' claims.

AFFIRMED

MEMORANDUM OPINION OF THE U.S. DISTRICT COURT, DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENEDICT A. WIDMER, et al. *

*

v. *

*

JOSEPH SMITH AND SONS, INC. *

Civil Action No.: WMN-96-137

MEMORANDUM

Pending before this Court is an appeal from a decision of the United States Bankruptcy Court for the District of Maryland (Bankruptcy Case No. 94-12947-DK), the Honorable Gerald H. Schiff, sitting by designation. Upon a review of the briefs[1], the record and the

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[1] Claude B. Shaffer, a former employee of Appellant Contaminated Soil Consultants, Inc., obtained leave of Court to file an amicus curiae brief. Appellee opposed the Amicus brief claiming it was an improper "Amicus petitor" brief that should be disregarded by the Court. The Court does not need to resolve this dispute between the parties because the Court did not find that Mr. Shaffer's brief changed the outcome

applicable case law, the Court determines that no hearing is necessary (Bankruptcy Rule 8012), and that the decision of the Bankruptcy Court will be affirmed.

I. BACKGROUND

Appellant Contaminated Soil Consultant, Inc. ("CSCI")[2], and Appellee Joseph Smith and Sons, Inc., are both participants in the waste management industry, although whether they are direct competitors is a disputed issue between the parties. Both businesses are involved in the sale of "fluff," a byproduct of scrap metal recycling, which is used to cover up refuse placed in local landfills.

After being accused of selling contaminated fluff and falsifying lab reports, in June of 1992, Appellee filed a lawsuit against Appellants and others in the Circuit

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in the present appeal.

[2] The other two appellants are Fred Zehner, owner of CSCI, and Benedict A. Widmer, a former employee of CSCI.

Court for Prince George's County[3]. Appellee subsequently filed its Chapter 11 petition on June 6, 1994. Appellants then filed proofs of claim in the bankruptcy proceeding alleging abuse of process against Appellee based upon Appellee's filing and prosecution of the Prince George's County action. Appellee filed a motion to estimate Appellants' claims as well as objections to those claims.

A hearing was held on October 17, 1995 before Judge Schiff. The parties agreed that the matter would be bifurcated to address first whether Appellants had a valid claim and then to address the amount of damages. After Appellants presented their case on liability, the hearing was recessed, and the court gave counsel an opportunity

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[3] This Court was not provided by Appellants with Appellee's original complaint, although it appears to have been admitted into evidence during the October 17, 1995 hearing. Therefore, it is not clear what was alleged in that lawsuit. Appellants state that there were nine (9) counts, Appellants' Brief at 4, and Judge Schiff referred to fraud and misrepresentation claims as well as claims under RICO, Oct. 17 Transcript at 4.

to provide further authority on the issue of liability. The hearing was resumed on the following day, and the court ruled from the bench that Appellants had not stated a cause of action for abuse of process under Maryland law.

II. LEGAL STANDARD

Factual findings of the Bankruptcy Court are reviewed under a clearly erroneous standard. Lubrizol Enterprises v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Conclusions of law are reviewed de novo. Caswell v. Jeffrey Lang, 757 F.2d 609 (4th Cir. 1985). Decisions committed to the discretion of the trial court are reviewed under an abuse of discretion standard. In re Southmark Corp., 88 F.3d 311, 314 (5th Cir. 1996).

III. DISCUSSION

A. Format of Judge Schiff's Opinion

Appellants complain that Judge Schiff did not

comply with Fed. R. Civ. P. 52 because he did not specifically identify findings of fact and conclusions of law. From its review of the hearing transcript, this Court disagrees. The record clearly shows that Judge Schiff stated his findings of fact with regard to each element of Appellants' claim of abuse of process, albeit briefly. See Oct. 18 Transcript at p. 4 lines 12-22, p. 5 lines 8-11.

B. Burden of Proof

Appellants also argue that Judge Schiff's conclusion of law that the burden of proof was on Appellants is clearly erroneous. Appellants explain that Judge Schiff stated that the debtor must rebut the initial presumption that a claim is valid[4], but that in this case there was no rebuttal because Judge Schiff adjourned the hearing before the debtor put on any evidence. Appellants' Brief

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[4] Judge Schiff stated at the beginning of the hearing that where "there's been an objection filed based upon the lack of substantiation of a claim, then I think the burden of going forward rests on upon the claimant." Oct. 17 Transcript at 6-7.

at 16.

The bankruptcy code makes clear that a proof of claim is allowed unless an objection to it is raised. 11 U.S.C. §502(a). In the interest of judicial economy, only those claims which are contested have to be proved. It is the debtor's objection, supported by probative evidence where necessary[5], which rebuts the presumption of validity of the claim and shifts the burden of production back to the claimant. In re Harrison, 987 F.2d 677, 680 (10th Cir. 1993). Because Appellee rebutted the presumption of validity of the claim in its objection, Judge Schiff's conclusion that the burden of proof rested with Appellants was correct.

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[5] Appellee's objection to Appellants' proofs of claim challenged Appellants' right as a matter of law to recover on the basis of an abuse of process claim. See Joint Objection to Claims of Fred G. Zehner, Contaminated Soil Consultants, Inc. and Benedict A. Widmer, Paper No. 1, at 5 ("The Zehner Claim provides no allegations which would support a claim based on abuse of process.") Therefore, Appellee would not have a burden to produce probative evidence but rather would have met its burden of production merely by raising the legal objection to the claims. See World Savings and Loan Ass'n v. Lenz, 110 B.R. 523, 525 (D. Colo. 1990) (where objection made as a matter of law, burden of going forward shifted back to claimant to prove legitimacy of its claim).

C. Abuse of Process

On the substantive issue in the case, Appellants argue that the court erred in its determination that Appellants had failed to show that Appellee had engaged in an abuse of process. The tort of abuse of process in Maryland focuses on the purpose for which the process is used once it has been properly issued in a case. Palmer Ford, Inc. v. Wood, 298 Md. 484, 511, 471 A.2d 797 (1984). The essential elements of the cause of action are (1) an ulterior motive, (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding, and (3) damages resulting from the perverted use of the process. Berman v. Karvounis, 308 Md. 259, 262, 518 A.2d 726, 727 (1987). "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required." Palmer Ford, Inc., supra, quoting from Prosser,

Law of Torts 857 (4th ed. 1971). There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 535, 321 A. 2d 182, 192 (1973), (quoting from, Prosser, supra, at 857), cert. denied, 272 Md. 742 (1974).

Appellants argue in the present case that Appellee filed the multi-count lawsuit with the ulterior motive of injuring Appellants' competitive position in the industry. Appellants further argue that Appellee acted improperly post-filing by prolonging the lawsuit unnecessarily, by failing to cooperate in discovery, and by neglecting to reduce the ad damnum request.[6]

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[6] The parties are in disagreement as to what this amount was and, again, because the Court "does not have a copy of the Complaint, it is difficult to resolve this question. Appellees claim that it was fifty-five million dollars including compensatory and punitive damages, but Appellants argue that amount was for just one of the nine counts and that the total for all the counts was $1.365 billion.

Appellee correctly counters that Appellants argument essentially goes to Appellee's allegedly improper motives in filing the lawsuit in the first place. What motivated the initial filing of the lawsuit is immaterial to an abuse of process claim. Herring, 21 Md. App. at 532.

Appellee also denies that it failed to cooperate in discovery or otherwise unnecessarily prolonged the litigation in order to vex Appellants. Judge Schiff did not make a specific factual finding in this regard, but simply stated that to the extent that the failure to complete discovery or to dismiss the lawsuit was the basis for the claim of abuse of process, these actions do not equate to the improper, unwarranted and perverted use of process required for this tort. Oct. 18 Transcript at 5.

In Palmer Ford, the Court of Appeals found that there was sufficient evidence to create a reasonable inference that the defendant had used criminal

proceedings to collect a debt from the plaintiff where the defendant had told the plaintiff's mother that unless her son's debt was paid, her son would be arrested and sent to jail. 298 Md. at 489-90. The court stated that a creditor cannot use the State's criminal courts as a private collection agency. Id. at 511-12. By contrast in Berman, the court held that there were no facts to show how the process was used for any purpose other than the normal one of obtaining personal jurisdiction. 308 Md. at 265. The court suggested that for this tort to have occurred, the defendant must have used process in some abnormal fashion to coerce or extort money or property from the plaintiff. Id.

It is clear, then, that the facts alleged by Appellants in the present action do not rise to the level of the perverse use of process required for the abuse of process tort. If delaying or other uncooperative behavior in

discovery and litigation was sufficient to make out this claim, unfortunately the courts would be flooded with these actions. Therefore, this Court affirms the bankruptcy court's conclusion of law that appellants failed to show that an abuse of process had occurred.

D. Ulterior Motive

Because this Court affirms the finding that there was no act which amounted to an improper or perverse use of process proper when issued, it does not need to reach the question of whether such act was committed with an ulterior motive. Judge Schiff found as a factual matter that the evidence presented did not support the conclusion that there was an improper motive. Oct. 18 Transcript at 4. His factual finding is not clearly erroneous and would not be disturbed on appeal even were the Court to reach this issue.

E. Appellants' Remedies at Lower Court Level

Finally Judge Schiff stated that to the extent that Appellee had filed a complaint in bad faith or was uncooperative in discovery, Appellants had remedies in the state court trial such as a motion for sanctions. Id. Indeed, a court may impose sanctions upon a finding that a party acted in bad faith or lacked substantial justification for filing a complaint or upon certain failures of discovery or refusals to comply with orders compelling discovery. Md. Rules 1-341, 2-433 (1996). Judge Schiff's comment regarding Appellants' possible remedies below was not dispositive of Appellants' claim. Rather, taken in context, Judge Schiff was merely suggesting that the problems complained of by Appellants were more properly addressed through such motions during the trial of the Prince George's County action than through a subsequent abuse of process claim.

Appellants argue that the court's remarks were

improper because Appellants had in fact pursued these remedies but to no avail. Appellant Zehner's testimony does not make explicit that Appellants had already pursued their remedies in this regard at the trial level, however. In the pertinent portion of his testimony, Zehner stated only that Appellee had responded falsely to interrogatories and had argued falsely in court in Prince George's County alleging that they had provided information in discovery which they had not. Oct. 17 Transcript at 51.

To the extent that Appellants were arguing to Judge Schiff that their motion for sanctions was improperly denied by the state trial court, they did so in an impermissibly obtuse way. But Appellee is incorrect that such an argument would be an improper collateral attack on a lower court judgment. After Appellee filed bankruptcy, the proceedings in the state court, as well as

any appeal of those proceedings, were stayed pursuant to 11 U.S.C. § 362. Therefore, Appellants did not have an opportunity to raise this issue other than in the bankruptcy case. But, because Appellants did not raise this issue in a sufficiently clear manner so that it could be ruled on by the bankruptcy court, the issue is not properly raised for the first time in this appeal.

IV. CONCLUSION

For all the above-stated reasons, the decision of the United States Bankruptcy Court for the District of Maryland is affirmed. A separate Order will issue.

/s/ William M. Nickerson

William M. Nickerson
United States District Judge

October 15, 1996

ORDER OF THE U.S. DISTRICT COURT, DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BENEDICT A. WIDMER, et al. *
*
v. *
Civil Action No.: WMN-96-137
*
JOSEPH SMITH AND SONS, INC. *

ORDER

Upon consideration of the briefs filed, and of the record below in this appeal of the decision of the United States Bankruptcy Court for the District of Maryland, it is this 15th day of October, 1996, by the United States District Court for the District of Maryland hereby ordered:

1. That the judgment of the United States Bankruptcy Court is AFFIRMED;

2. That this case is hereby CLOSED; and

3. That the Clerk of the Court shall mail copies

of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
William M. Nickerson
United States District Judge

BANKRUPTCY COURT'S ORDER SUSTAINING OBJECTIONS TO CLAIMS

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND
(Southern Division)

In re:	:
	:
JOSEPH SMITH & SONS, INC.,	:
	:
Debtor.	:
	:
Chapter 11 Case No. 94-1-2947 DK	:

ENTERED OCT 24, 1995

ORDER SUSTAINING OBJECTION TO CLAIMS OF FRED G. ZEHNER, CONTAMINATED SOIL CONSULTANTS, INC. AND BENEDICT A. WIDMER

Upon consideration of the Joint Objection of Joseph Smith & Sons, Inc., debtor and debtor-in-possession herein, and R. Paul Smith, debtor and debtor-in-possession in related case styled In re R. Paul Smith, Case No. 94-1-2948 DK, requesting the Court to disallow in their entirety the claims of Fred G. Zehner, Contaminated Soils Consultants, Inc. and Benedict A. Widmer (the "Objection"), on the basis that such claims are contingent, unliquidated and disputed, and appropriate notice having been given to the claimants and all other parties in interest, and based upon any response filed by the claimants, and for other reasons more particularly set forth in the Objection, it is hereby

ORDERED, that the Debtor's Objection be, and the same hereby is, SUSTAINED; and it is further

ORDERED, that Claim No. 34 asserted by Fred G. Zehner be, and the same hereby is, DISALLOWED in its entirety; and it is further

ORDERED, that Claim No. 35 asserted by Contaminated Soil Consultants, Inc. be, and the same hereby is, DISALLOWED in its entirety; and it is further

ORDERED, that Claim No. 38 asserted by Benedict A. Widmer be, and the same hereby is, DISALLOWED in its entirety.

Dated:__ /s/ Gerald H. Schiff
United States Bankruptcy Judge

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**BANKRUPTCY COURT'S ORDER
DISMISSING MOTIONS TO ESTIMATE CLAIMS**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MARYLAND

In re: *
*
JOSEPH SMITH & SONS, INC., *
*
Debtor(s). *
*

Case No. 94-1-2947 DK
Chapter 11

ORDER DENYING JOINT MOTION
TO ESTIMATE CLAIMS OF F. Zehner & B. Widmer
AS MOOT

Upon consideration of the Joint motion to estimate claims of F. Zehner and B. Widmer is, this 18th day of

October, 1995, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, That the motion be and hereby is denied as moot.

/s/ Gerald H. Schiff
Gerald H. Schiff
United States Bankruptcy Judge
for the District of Maryland

cc: All Parties
All Counsel

TRANSCRIPT OF BANKRUPTCY COURT'S BENCH RULING, OCTOBER 18, 1995

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

- - - - - - - - - - - - - - - - -

In Re: :
:
JOSEPH SMITH & :

SONS, INC. :
:
Case No. 94-1-2947DK(11)
:
and :
:
R. PAUL SMITH :
Case No. 94-1-2948DK(11)
:
Debtors. :
- - - - - - - - - - - - - - - - - - -

October 18, 1995

U.S. Bankruptcy Court
Greenbelt, Maryland

H E A R I N G

On joint motion to estimate claims of F. Zehner and B. Widmer; joint objection to claims of F. Zehner and B. Widmer (continued)

B e f o r e:

THE HONORABLE GERALD H. SCHIFF
Sitting by Designation

A p p e a r a n c e s:

R. PAGE WYROUGH, ESQUIRE
NELSON COHEN, ESQUIRE
PAUL BRAN, ESQUIRE

On behalf of the Debtors

DOUGLAS THOMAS, ESQUIRE
On behalf of the Claimants

MARK BERMAN, ESQUIRE
On behalf of the Creditors

SUBURBAN REPORTING SERVICE
Post Office Box 1415
West Bethesda, Maryland 20827
(301) 229-2223

THE COURT: The specific action or cause of action that has been asserted is an abuse of process. I believe that the jurisprudence is clear in setting forth the elements that a plaintiff must establish in order to succeed under this cause of action.

First of all, the plaintiff must establish that the defendant had an ulterior motive in pursuing its cause of action and secondly, that to that end, the defendant used the legal system in an improper, unwarranted and

perverted manner.

I believe that the jurisprudence is clear that the mere issuance of process is not actionable as an abuse of process, regardless of how tainted that original complaint or process may be.

There must be a subsequent use of the process after the institution of the lawsuit and the particular use must be improper.

This primarily, I believe, is a burden of proof case. When a creditor files a proof of claim the rules provide for and jurisprudence supports the finding that the proof of claim is prima facie allowed and the burden of moving forward then falls upon the debtor insofar as disproving or disallowing that claim is concerned.

Once the debtor rebuts that initial presumption, the burden of proof, insofar as moving forward with the burden of proof, falls back on the claimant. In all

instances, the claimant bears the burden of proof.

The Court is of the opinion that in this case the claimants have failed completely to satisfy the elements of abuse of process that the Court has examined as being required under the cases that we have reviewed.

As I stated earlier, the cause of action requires the establishment by the claimant of an ulterior motive. The only ulterior motive I suspect that I heard yesterday dealt with attempting to destroy the claimant, CSCI, as a competitor of the debtor, Joseph Smith.

I do not believe that the testimony that I heard supported that conclusion. That was a conclusory statement, but the evidence did not support it.

Mr. Widmer, both in deposition and in testimony, felt that Joseph Smith was in fact at that time really not a competitor. I understand Mr. Zehner did believe that Joseph Smith was a competitor at some time, but I do not

believe that any testimony that I heard yesterday rises to the level of showing that the defendant, or debtor in this instance, had an ulterior motive in pursuing its cause of action, as set forth in the complaint.

In addition, I do not believe that the evidence supported a finding that the debtor used the legal system in an improper, unwarranted and perverted manner.

The only allegation of improper post complaint use of process deals with the extended period of time resulting from failure to complete discovery, failure to dismiss the lawsuit and again, I do not believe that when we hear testimony regarding these actions, the conduct equates to improper, unwarranted and perverted use of process. I believe that much more needed to be shown in order to satisfy these elements.

The claimants certainly had appropriate devices to use while the case was both in state and in federal courts.

Rule 11 sanctions were available in the federal system, I assume that there is a counter part in the Maryland statutes which would have been available.

Rule 37 under the Federal Rules of Civil Procedure deals with failure to comply with discovery requests. I suspect that there is a counterpart in the statutes of Maryland which would have given some relief to the claimants in the pursue of their discovery problems.

Be that as it may, we're here today in connection with the objections to the claims of Zehner, Widmer and CSCI. The Court will sustain the debtors' objection in each case and will disallow the proofs of claim of Mr. Zehner, Mr. Widmer and CSCI.

The debtors' motion in each case to estimate the claims of those parties is denied as moot. The Court will prepare an appropriate order.

Anything further, gentlemen?

MR. WYROUGH: Thank you very much, Your Honor.

THE COURT: Court is adjourned.

MR. THOMAS: Your Honor, Your Honor

(Whereupon, at 9:45 p.m. the hearing was adjourned.)

PARTIAL TRANSCRIPT OF BANKRUPTCY COURT'S BENCH RULING ON BURDEN OF PROOF AND OF GOING FORWARD, OCTOBER 17, 1995

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Greenbelt Division)

- - - - - - - - - - - - - - - - - -

In Re: :
:
JOSEPH SMITH :
& SONS, INC. :
Case No. 94-1-2947DK(11)
:
and :

R. PAUL SMITH :
Case No. 94-1-2948DK(11)
:
Debtors. :

October 17, 1995

U.S. Bankruptcy Court

Greenbelt, Maryland

HEARING

On joint motion to estimate claims of F. Zehner and B. Widmer; joint objection to claims of F. Zehner and B. Widmer.

Before:

THE HONORABLE GERALD H. SCHIFF
Sitting by Designation

Appearances:

R. PAGE WYROUGH, ESQUIRE
NELSON COHEN, ESQUIRE
PAUL BRAN, ESQUIRE
On behalf of the Debtors

DOUGLAS THOMAS, ESQUIRE

On behalf of the Claimants

MARK BERMAN, ESQUIRE
On behalf of the Creditors

SUBURBAN REPORTING SERVICE
Post Office Box 1415
West Bethesda, Maryland 20827
(301) 229-2223

Pages 6-7:

THE COURT: We have two motions. We have the debtors' motion seeking an estimation of the claim and we also have the debtors' -- when I refer to the debtor, I'm going to be speaking of both debtors because the pleadings mirror one another in this regard.

We also have the objection to claims that the debtor has filed. We addressed this problem yesterday with respect to a similar set of motions that appeared in this case and if I try the objection, that makes the estimation moot because once there's been an objection

filed based upon the lack of substantiation of a claim, then I think the burden of going forward rests upon the claimant.

Ultimately, the claimant has the burden of proof of its claim under any circumstances. Well, if you're going to prove up not only the existence of the claim but the amount of the claim, that moots the estimation requirement, so I think we're here primarily on the objection to the claim, both as to the existence of the claim and the amount of the claim.

Mr. Thomas, call your first witness.

FOURTH CIRCUIT COURT OF APPEALS
ORDER UPON MOTION FOR
RECONSIDERATION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: September 17, 1997

No. 96-2744
CA-96-137-WMN
BK-94-12947

In Re: JOSEPH SMITH & SONS, INCORPORATED;
In Re: RICHARD WYBROUGH

Debtors

- - - - - - - - - - - - - -

FRED G. ZEHNER; CONTAMINATED SOIL CONSULTANTS, INCORPORATED

Claimants - Appellants

and

BENEDICT A. WIDMER

Claimant

CLAUDE B. SHAFFER

Party in Interest

v.

JOSEPH SMITH & SONS, INCORPORATED

Debtor - Appellee

- - - - - - - - - - -

ORDER

The appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

dated September 17, 1997